Public Prosecutor v Vathumalai a/l Mahalingam

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45–1 OF 2000
ABDULL HAMID EMBONG J
31 JANUARY 2003

Criminal Law *— Penal Code — s 300 — Murder — Charge based on circumstantial evidence — Whether circumstances preceding to the death of the deceased led to an inference that the accused was involved — Whether prosecution established a prima facie case — Whether there are gaps in evidence*

Criminal Procedure *— Confession — Admissibility — Oppressive circumstances under which confession was made — Voluntariness test*

Criminal Procedure *— Police investigation — Statement by accused — Admissibility of — Recording officer had an indirect interest — Whether knowledge and interest of recording officer would mitigate his objectivity — Voluntariness test*

The accused borrowed his father-in-law's car and together with his wife, the deceased, left their residence at Cameron Highlands, to come shopping in Ipoh. Whilst shopping at the Parkson departmental store in Ipoh, the deceased went missing. The accused then went over to his sister-in-law who was staying in a hostel in Ipoh to seek her assistance to search for the deceased. Together they searched the whole of Parkson and made enquiries but to no avail. They also asked for assistance from the security guards at Parkson, who advised them to lodge a missing person police report, which the accused subsequently made. After that, the accused continued with the search until nightfall. They went around the Ipoh city area in the car but could not find the deceased. The next morning the accused resumed the search by driving around. While driving, the accused sighted the deceased lying in the roadside drain. Help was called for and the police and ambulance arrived not long after. The accused was charged with the murder of his wife.

Held:

(1) The circumstances preceding the death of the deceased and leading to the recovery of the body could not led this court to any inference that the accused was involved in this murder. On the contrary, an inference favorable to him should be found in the circumstances since the accused had been searching for the deceased since the preceding day. Taking all the circumstances together, the court was of the opinion that the circumstantial evidence adduced by the prosecution was far from sufficient to found a prima facie case against the accused. In fact, they were consistent with his innocence. To found a prima facie case, the prosecution should bring out sufficient evidence, not inherently incredible to establish each essential element of the offence (*Haw*

Tua Tau v PP [1981] 2 MLJ 49). There must not be, as was found in this case from the facts adduced by the prosecution, gaps in the cases; especially if its case was founded on circumstantial evidence entirely (see pp 556F–557A). A

(2) It is highly undesirable for the recording officer to be aware of the background of the offence lest it might affect his objectivity. This proposition is equally applicable in the instant case where it was admitted by the recording officer himself that he was well aware of the investigation against the accused. To make it worse, he stated that he had an indirect interest in the solving of the case since he might be called in to assist the investigation if it was not solved. This knowledge and interest in the case would mitigate any objectivity he had as a recording officer. A strong inference could be made that a confession from the accused now, would save him the burden of further investigations later (see p 559A–B). B C

(3) The court accepted the evidence of the accused that there were oppressive circumstances surrounding the making of his confession. There was also evidence that the accused had been threatened by the interrogation team into making this confession. All considered, the court found as a fact that the cautioned statement was recorded under oppressive circumstances. The prosecution had failed to discharge its burden to prove that the cautioned statement was voluntarily given by the accused. In the result, its admission as evidence was denied (see p 559C–E, I). D E

[Bahasa Malaysia summary F

Tertuduh telah meminjam kereta bapa mertua beliau dan bersama isterinya, si mati, telah meninggalkan tempat penginapan mereka di Cameron Highlands, untuk membeli-belah di Ipoh. Semasa membeli-belah di pasaraya Parkson di Ipoh, si mati telah hilang. Tertuduh kemudian telah pergi ke rumah adik ipar perempuan beliau yang tinggal di sebuah asrama di Ipoh untuk meminta bantuan beliau mencari si mati. Mereka berdua mencari sekeliling Parkson dan membuat pertanyaan tetapi tiada apa-apa berita. Mereka juga telah meminta bantuan penjaga-penjaga keselamatan di Parkson, yang telah menasihatkan agar mereka membuat laporan polis tentang orang yang hilang, yang berikutan itu telah dibuat oleh tertuduh. Setelah itu, tertuduh meneruskan carian sehingga malam. Mereka telah meronda kawasan kotaraya Ipoh dalam kereta tetapi tidak menjumpai si mati. Keesokan pagi, tertuduh meneruskan carian dengan memandu sekeliling. Semasa memandu, tertuduh menjumpai si mati dalam longkang di tepi jalan. Beliau meminta pertolongan dan pihak polis dan ambulan tiba tidak lama kemudian. Tertuduh dituduh membunuh isteri beliau. G H I

Diputuskan:

(1) Keadaan-keadaan sebelum kematian si mati dan sehingga mayat dijumpai tidak boleh memberi petunjuk kepada mahkamah ini kepada apa-apa inferens bahawa tertuduh terlibat dalam pembunuhan ini. Sebaliknya, satu inferens yang menyebelahi beliau patut wujud berdasarkan keadaan di mana tertuduh telah mencari si mati sejak hari sebelumnya. Dengan mengambilkira semua keadaan, mahkamah berpendapat bahawa keterangan ikut keadaan yang dikemukakan oleh pihak pendakwa tidak mencukupi untuk membuktikan terdapat satu kes prima facie terhadap tertuduh. Bahkan, ia adalah konsisten dengan ketakbersalahan beliau. Untuk membuktikan terdapat satu kes prima facie, pihak pendakwa hendaklah mengemukakan keterangan yang mencukupi, yang boleh membuktikan setiap elemen penting kesalahan tersebut (*Haw Tua Tau v PP* [1981] 2 MLJ 49). Tidak boleh ada, seperti dalam kes ini berdasarkan fakta-fakta yang dikemukakan oleh pihak pendakwa, lompang dalam kes-kes; terutamanya jika ia adalah kes yang berasaskan keterangan ikut keadaan sepenuhnya (lihat ms 556F–557A).

(2) Adalah paling tidak diingini jika pegawai perekod sedar tentang latar belakang kesalahan agar jangan sampai menjejaskan keobjektifan beliau. Hal ini sama terpakai dalam kes semasa di mana ia telah diakui oleh pegawai perekod sendiri bahawa beliau cukup sedar tentang soal siasat terhadap tertuduh. Yang lebih buruk, beliau menyatakan bahawa beliau mempunyai kepentingan tidak langsung dalam menyelesaikan kes ini kerana beliau mungkin dipanggil untuk membantu dalam siasatan tersebut jika ia tidak diselesaikan. Pengetahuan dan kepentingan dalam kes akan meringankan apa-apa keobjektifan yang beliau ada sebagai seorang pegawai perekod. Satu inferens yang kukuh boleh dibuat bahawa satu pengakuan salah daripada tertuduh sekarang, akan menyelamatkan pegawai perekod terbabit daripada beban menyiasat kes tersebut (lihat ms 559A–B).

(3) Mahkamah menerima keterangan tertuduh bahawa terdapat keadaan sekeliling yang menindas beliau dalam membuat pengakuan salah. Terdapat juga keterangan bahawa tertuduh telah diugut oleh pasukan soal siasat dalam membuat pengakuan salah ini. Dengan menimbangkan kesemuanya, mahkamah mendapati sebagai satu kenyataan bahawa pernyataan beramaran telah direkodkan dalam keadaan yang menindas. Pihak pendakwa telah gagal untuk melepaskan beban buktinya bahawa pernyataan beramaran tersebut telah dibuat secara sukarela oleh tertuduh. Akibat daripada itu, ia tidak diterima sebagai keterangan (lihat ms 559C–E, I).]

Notes

For cases on Penal Code s 300, see *Mallal's Digest* (4th Ed, 2001 Reissue) paras.

Cases referred to

Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306 (refd)
PP v Mohd Fuzi bin Wan Teh & Anor [1989] 2 CLJ 652 (refd)

Legislation referred to

Criminal Procedure Code s 113(2)
Penal Code s 302

Nurulhuda Nur'aini bte Mohd Nor (Deputy Public Prosecutor) for the prosecution.
Harjit Singh (*PS Sohanpal & Sidhu*) for the accused.

Abdull Hamid Embong J: The accused is charged with the murder of his wife. The charge reads as follows:

> Bahawa kamu, pada 14 September 1999 di antara jam 4.00 petang hingga 8.00 malam di Jalan Gereja, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian Umasuriya a/p Muniandy, KP No 801031-08-5896, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

Facts

On 14 September 1999, the accused borrowed his father-in-law's car, a Proton Saga, and together with his wife, the deceased, left their residence at Cameron Highlands, to come shopping in Ipoh. Whilst shopping at the Parkson departmental store in Ipoh, the deceased went missing. The accused then went over to his sister-in-law (SP8, who is the elder sister to the deceased) who was staying in a hostel in Ipoh to seek her assistance to search for the deceased. Together they searched the whole of Parkson and made enquiries but to no avail. They also asked for assistance from the security guards at Parkson, who advised them to lodge a missing person police report, which the accused subsequently made (see P3). After that the accused and SP8 continued with their search till nightfall. They went around the Ipoh city area in the car but could not find the deceased. The next morning the accused turned up again at SP8's hostel to pick her up and together they resumed their search by driving around. While driving

along Jalan Gereja, the accused sighted the deceased lying in the roadside drain. This happened when the accused was reversing his car as Jalan Gereja was a no-through road. The accused cried out 'Itu dia Umasuriya (the deceased) di situ', when he saw the body on the way out of the said road. Help was called for and the police and ambulance arrived not long after.

A postmortem examination was carried out the next morning by a forensic pathologist Dr Kairul Azman ('SP12') and it was determined that the deceased died of 'asphyxia due to smothering.' The deceased was also found to have sustained several abrasions on her face consistent with her being smothered with a soft object. There was also a suggestion in the postmortem report (P13) prepared by SP12 that the deceased tried to defend herself while being smothered. In my view there was clear evidence that the deceased was killed by someone, and that this was not an accidental death or one due to natural causes.

The investigating officer (the IO, SP13) arrived at the scene shortly after the deceased's body was found. The deceased had by then, been moved from the drain into the Proton car driven by the accused. At the scene, a search was conducted on the Proton car, and the IO recovered a pair of slippers belonging to the deceased, a small towel, and from the car boot a bag and a plastic package. From his investigations, the IO found that the recovered items belonged to both the accused and the deceased. He then brought the Proton car and the items recovered therein back to the police station. The towel and the slippers were sent to the Chemistry Department for analysis. Upon analysis, the chemist found the towel to contain five strands of human head hairs, which according to his report ('P17') were found to be dissimilar to the sample of human head hair, purportedly belonging to the deceased. P17 did not mention about the slippers purportedly sent for analysis. In my view, nothing came out of the analysis of these two exhibits to assist the prosecution case. The relevance of their production was that they were recovered from the Proton car driven by the accused. The car was seized and detained by the IO in the compound of the police station until its release back to the owner on 22 September 1999. At the scene, photographs of the internal views of the car were taken. One item shown in the photographs (see P11H), namely a white plastic bag lying on the floor was not seized by the IO. The photographs also did not show the towel recovered by the IO, although the sketch plan (P14) did show that it was recovered from the car. No search list was however prepared to list the items recovered from the car. The car was in the custody of the police for one week until it was returned. The IO also returned all the items found in the boot of the car back to the deceased father. These were clothings (see photo P11G) which were also not seized by the IO during his investigation. As a matter of observation, the IO admitted in his evidence that he had not done a thorough investigation on the items recovered in the car. This in my view was unfortunate since the car and those items were in his custody at the police station for a whole week. It was also unfortunate that the IO returned all

the items recovered from the boot of the car to the deceased's father ('SP3') without determining if they were material exhibits in the prosecution of this case.

Two days after the car was returned to SP3, the accused's father and another person came over to SP3's house in Cameron Highlands to inspect the car but was refused by SP3. Instead SP3 called in the police and two policemen came to do a search on the car but found nothing. When the police left, SP3 searched the car and according to him found, in the car boot, some jewellery items viz, a gold chain with a thali, a pair of earrings and a ring belonging to the deceased. SP3 replaced these items back to the original place he had found them and drove the car to the police station to hand them over. These items (P6, P7 & P8) were seized by the officer in charge of the police station in Cameron Highlands. Nothing much turn on these items as evidence relevant to the charge except that they were personal belongings of the deceased. As for its recovery, it remained a mystery and this court had grave doubt that SP3 could have recovered them from the boot of the car when, before that, the car had been searched by the IO at the scene and also by the two policemen at Cameron Highlands who came over to search the car when SP3 called in the police. I find it impossible to accept that the two previous professional searches conducted by the police could have missed these items lying in the boot of the car, seemingly for all to see. There was some evidence to suggest that the accused's father had come to reclaim these jewellers items which were a wedding gift from the accused's family to the deceased.

The prosecution case was based purely on circumstantial evidence. In essence the prosecution had proven that the accused was the last person seen with the deceased, that they had travelled together in the Proton car from Cameron Highlands to do some shopping in Ipoh and that it was the accused who first saw the body of the deceased lying in the drain along Jalan Gereja. It was in the evidence of the deceased's father (SP3) that the relationship between the accused and the deceased, as husband and wife seemed good. Thus, it is no surprise that the prosecution had not tried to show that this killing was motivated by any ill feelings on the part of the accused towards his wife — the deceased, as there was none.

The prosecution tried to adduce as evidence the cautioned statement of the accused which after a trial within a trial was held by this court to be inadmissible as it failed to meet the statutory requirement of voluntariness under s 113 of the Criminal Procedure Code ('the CPC').

Without the confession, this court was left to evaluate the circumstantial evidence. It was not in dispute that the deceased had died from asphyxia, due to smothering. How the deceased was suffocated or what material was used to suffocate her was however not in evidence at all. The towel that was recovered from the car that was driven by the accused was obviously not the object used to smother the deceased for if it had been, the chemist would certainly had detected it and stated so in the chemist report. Without any physical evidence to connect the accused to this

murder, this court is now left with only those factors and circumstances as stated earlier to make an inference if the accused was involved in and had the intention to commit this murder. The circumstances had to be totally considered to determine if the prosecution had successfully raised a prima facie case to call upon the accused to enter into his defence.

The legal principle as regards consideration of circumstantial evidence had been stated by the Federal Court in *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 275 where Abdoolcader FJ stated it in the following words:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused ... .

In *Jayaraman & Ors v PP* [1982] 2 MLJ 306, the Federal Court considered the approach a trial judge needs to take in evaluating circumstantial evidence when it quoted with approval two previous decisions of the Court of Appeal and the Federal Court. Suffian LP said this at p 308:

> In *Chan Chwen Kong v PP* [1962] MLJ 307 the appellant was convicted of the murder of a woman and her child. The evidence against the appellant was entirely circumstantial and this was one of the grounds of appeal. Thomson CJ, as he was then was, in giving the judgment of the Court of Appeal said (at p 307):
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> > 'That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?'
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> In the case of *Karam Singh v PP* [1967] 2 MLJ 25 the appellant appealed against his conviction for murder. There was no eyewitness of the attack on the deceased; the prosecution case was based entirely on circumstantial evidence. Ong Hock Thye FJ, as he then was, in giving the judgment of the Federal Court said (at p 29):
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> > 'In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.'

In her submission at the close of the prosecution case, the learned deputy public prosecutor had urged this court to consider the totality of the circumstantial evidence in finding a prima facie case against the accused. The learned deputy public prosecutor submitted that it was the accused himself who had seen the deceased body which was lying in a drain in a position not obvious to passers by. She also submitted that the deceased had not gone shopping since her handbag was found in the car. She further submitted that the accused had not shown any sadness when he found his

wife's body. Lastly she submitted that the towel was found in the car. As for the towel, it has been said earlier in this judgment that, nothing came out of its discovery or its analysis. As for the other circumstances raised by the learned deputy public prosecutor in her submission it is this court's finding that the evidence as presented by the prosecution had shown the contrary. The fact that the deceased's handbag was found in the car could not raise an inference that she had not gone shopping at Parkson with the accused. It is not uncommon for one to leave one's handbag behind and carry only cash or credit card in one's pocket, for the reason that it is safer to do so. Further, there was not an iota of evidence to say that the deceased had left her handbag in the car before she went shopping. That aside, it was never denied that the accused and the deceased had actually gone shopping together. But the question is whether this strand of evidence was a sufficient circumstance, either standing alone or considered with other circumstancial evidence to found a prima facie case against the accused? I think not.

There was also no evidence that the accused had not shown any sadness when the deceased body was found. SP8, who was with the accused at the scene then had testified that she had not seen how the accused reacted to the situation. This was plausible as she herself was in tears when she rushed over to her sister. She could not have seen if the accused had shown any emotion. Under cross-examination, SP8 had agreed that the accused may be in tears but she admitted that she was not paying attention to the accused then.

As for the place where the deceased's body was recovered, the photographs clearly showed that the body was lying in a shallow drain next to the road. It was an open space with no bushes or undergrowth and the body could easily be sighted.

The circumstances preceding the death of the deceased and leading to the recovery of the body, to my mind, could not lead this court to any inference that the accused was involved in this murder. The accused and the deceased had gone shopping in a busy departmental store. The deceased went missing and he had searched for her. He then sought the help of his sister in law to continue with the search until late that evening. A police report was lodged. The next morning the accused and his sister in law continued with the search when they found the deceased's body. It may be sheer coincidence that the accused saw the body lying in the drain along Jalan Gereja. This fact alone could not impute any guilt on the accused. On the contrary, an inference favorable to him should be found in the circumstances since the accused and SP8 had been searching for the deceased since the preceding day. Taking all the circumstances together, this court was of the opinion that the circumstantial evidence adduced by the prosecution was far from sufficient to found a prima facie case against the accused. In fact, they were consistent with his innocence. To found a prima facie case, the prosecution should bring out sufficient evidence, not inherently incredible to establish each essential element of the offence (see *Haw Tua Tau v PP* [1981] 2 MLJ 49). There must not be, as is found

in this case from the facts adduced by the prosecution, gaps in the cases; especially if its case was founded on circumstantial evidence entirely. As was stated by the Federal Court in *Chang Kim Siong v PP* [1968] 1 MLJ 36:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

It was on this premise that this court found that the prosecution had failed to establish a prima facie case and the accused was forthwith acquitted and discharged.

The cautioned statement ('CS')

The prosecution attempted to put in the accused's CS recorded pursuant to s 113 of the CPC, to prove its case. A trial within a trial was held to determine its voluntariness and at the end of the voire dire the CS was held by this court to be inadmissible.

The CS was recorded by one ASP Ravinder who knew of the murder case and that an arrest was made. ASP Ravinder also said that he had an indirect interest in the case since, if it was not solved, he would be required to assist in the investigation of the murder. The CS was recorded in Bahasa Malaysia since this was the language preferred by the accused and a language he was fluent in. He had used an interpreter, one Lans Korporal Anna in recording the statement from the accused. He said that the accused told him that he (accused) was a gentleman and would 'tell all' to him. The CS under s 113 of the CPC was read to the accused and interpreted in Tamil to the accused. It was established during cross examination of L/Kpl Anna that she had not informed the accused of his right to remain silent if he so wished. ASP Ravinder did not ask the accused if he understood the consequences of him giving the statement.

On the day the CS was recorded, 15 September 1999 from 9.30am to 2pm, the accused was in the custody of the investigating officer, one ASP Ariffin, on whom it was put that the accused was not provided with any food during that period. ASP Ariffin admitted that his team do not provide food to suspects but on that particular day, he said that the accused's family was in his office during the investigation and they had been allowed to see the accused between 9.30am and 2pm that day and that the family members could have provided him with food if they so wished. Under cross-examination however, ASP Ariffin relented on this story when it was put to him that a suspect will not be allowed any visitor if the investigation against him was not over. He also admitted that there was no entry in the station diary or his investigation diary that the accused was allowed visitors.

In his evidence, the accused had testified that he was assaulted during interrogation. He also said that he was refused his 'asthma pump' and that if he did not confess to the murder, his sister-in-law ('SP8') would also be arrested. He also alleged that he was not given any food during his interrogation at the 'C' Team office, and that food was given only after 5.30pm that day. When the CS was recorded, the accused said that the caution was not explained to him. He was also not told of his right to remain silent. He said that he gave the CS because he was afraid that he would be further assaulted by the three Indian and one Malay detectives who interrogated him earlier as they had warned him that they would do it. ASP Ariffin had also warned him that he would be in further trouble if he did not confess and he took this to mean that he would face further assault and torture. The accused tendered a medical report (D1) to show that he was an asthma patient.

In deciding the issue of admissibility of a confession, the onus is not on the accused to show involuntariness but upon the prosecution to prove beyond a reasonable doubt that the confession was voluntary (see Supreme Court decision in *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321). The Supreme Court in that case also decided that in deciding whether or not a statement made by an accused person was obtained from him by fear of prejudice or hope of advantage exercised or held by a person in authority the cardinal point is not so much the state of mind of the police officer but that of the accused.

In this defence, the accused had also stated that the recording officer had failed to explain to him the caution under s 113 of the CPC, failed to explain the consequences of him giving the statement and also failed to further caution him under s 113(2) of the CPC, ie of his right not to answer any question. The said subsection reads:

> (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him.

L/Kpl Anna had testified that she had explained the caution to the accused by telling him that whatever he said may be given in evidence. She had however, not explained to him that he need not answer any questions. The accused was also not informed of his right to remain silent. ASP Ravinder also admitted that the accused was not told of the consequences of him giving the CS. In my view, these shortcomings were fatal to the prosecution case. As was held in the case *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652, now applied:

> The administering of the caution should not be merely a mechanical exercise or just reading it to the accused. The recording officer should explain the caution and its consequences to the accused.

It was also held in that case that it is highly undesirable for the recording officer to be aware of the background of the offence lest it might affect his objectivity. This proposition is equally applicable in the instant case where it was admitted by the recording officer himself that he was well aware of the investigation against the accused. To make it worse, he stated that he had an indirect interest in the solving of the case since he might be called in to assist the investigation if it was not solved. This knowledge and interest in the case, to my mind would mitigate any objectivity he had as a recording officer. A strong inference could be made that a confession from the accused now, would save him the burden of further investigations later.

I also accept the evidence of the accused that there were oppressive circumstances surrounding the making of his confession. There was evidence that the accused was an asthma patient and that he was denied the use of his 'asthma pump', ie an inhaler that would relief his suffering. There was also evidence that the accused was denied any food whilst in the custody of ASP Ariffin for the duration of the interrogation period from 9.30am to 2.30pm which was immediately prior to the recording of the CS. The testimony of ASP Ariffin himself had supported this. There was also evidence that the accused had been threatened by the interrogation team into making this confession. All considered, this court found as a fact that the CS was recorded under oppressive circumstances. The test for voluntariness of a confession should also take into account such oppressive circumstances as was held in *Hasibullah* where Edgar Joseph Jr SCJ for the Federal Court stated at p 333 of the report:

> On a further ground also, the judge ought to have excluded the appellant's alleged confession having regard to the oppressive circumstances under which it was made (assuming for one moment that it was made at all). There is high authority for the proposition that the 'voluntariness' test has been expanded to include within its ambit, statements which are rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. It is true that the provisions of proviso (a) to s 37A(1) of the Act which repeat s 24 of the Evidence Act 1950, do not provide for this as a ground for excluding a confession by an accused person, but the authority to which we shall be referring in a moment, appears to have incorporated the common law.

Having considered the evidence, it was this court's finding that the caution given to the accused was not fully and properly administered. It was at variance with the requirements under s 113 of the CPC. This flaw was fatal. This coupled with the fact that there were oppressive circumstances surrounding its making, I had found thus, that the prosecution had failed to discharge its burden to prove that the CS was voluntarily given by the accused. In the result, its admission as evidence was denied.

The accused was accordingly acquitted and discharged without his defence called. A

Order accordingly.

Reported by Peter Ling B

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